

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 98-102

December 15, 1998

To: All Regional Directors, Officers-in-Charge,
And Resident Officers

From: Richard A. Siegel, Associate General Counsel

Subject: Determination of Backpay due in Meritorious Cases

The Inspector General recently conducted an audit of controls over the computation and disposition of backpay in our Regional Offices. The auditor reviewed randomly selected case files in which backpay was distributed to ascertain whether the backpay computations contained therein were in accord with Agency policies and to confirm that the backpay was collected and distributed to discriminatees appropriately. The Inspector General is satisfied that the Agency's procedures ensure that backpay obtained for discriminatees is being appropriately distributed to the individuals entitled to receive the awards. However, the audit revealed that Regional Offices are not consistently following established policies requiring the assessment of backpay due when the Regional Director finds merit to an unfair labor practice case. Under outstanding instructions¹ Regions are to determine the amount of backpay due as a remedy to ascertain whether proposed settlements meet the criteria for settlement established by the Agency.

Under most circumstances, the Region's determination of appropriate remedies including backpay, is an essential prerequisite to its consideration or preparation of a settlement offer. Consistent with our longstanding practice, Regional Office files in meritorious cases should contain documentation clearly describing the Region's assessment of the backpay due. Even where a Charged Party has filed for bankruptcy or has indicated an intention to file for bankruptcy, backpay should be computed for the purposes of filing a proof of claim and to anticipate efforts by a debtor or creditor to litigate backpay in a bankruptcy proceeding.

There are at least two situations where backpay computations may not be feasible or worth the investment of time and resources and therefore, computations will not be required. The first situation is where the Region has concluded that a respondent is unable to pay any amount owing. In these circumstances, the actual total due is irrelevant. The second situation is where a Charging Party or discriminatee expresses an unwillingness to cooperate further in Agency proceedings, refusing any remedy or preferring instead to accept a non-Board settlement.

¹ Case Handling Manual §10500.2, 10505.2, 10530.3, 10530.4, and 10531.

Accordingly, Regional Directors may exercise discretion and assess the reasonableness of settlements without an independent determination of backpay due in cases where it is clear that the respondent's demonstrated financial condition would preclude its payment of a substantial monetary remedy or where a Charging Party or backpay claimant impedes efforts to determine the amount due by expressing an unwillingness to further cooperate in Agency proceedings. However, in such cases the file should reflect the basis for not including a reasonable estimate of the amount due.

As there may be other circumstances that excuse the failure to make backpay estimates, Regional Directors may seek clearance under Section 10680.1, A (20) of the Casehandling Manual from the Division of Operations-Management.

The procedures for approving withdrawals in cases resolved by non-Board settlements prior to a determination of merit are not affected by this memorandum. Directors may continue to approve withdrawals in cases prior to determination in accordance with Section 10142 of the Casehandling Manual.

Please take the necessary steps to notify members of your staffs of this change to ensure that this procedure is followed. The Casehandling Manual will be revised to reflect this change in procedure.

Any questions concerning this memorandum should be addressed to your Assistant General Counsel, Deputy Assistant General Counsel, or to me.

R.A.S.

cc: NLRBU

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